IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.211 OF 1991.

1. Shri Shankar Joti Motugade

2. Shri Tatoba Joti Motugade

3. Sadashiv Anna Motugade

4. Dhondi Mahadu Motugade,
since deceased by heirs

4a. Parshuram Dhondi Motugade.

4b. Ananda Dhondi Motugade

4c. Nayku Dhondi Motugade

4d. Mahaling Dhondi Motugade

4e. Smt. Akkatai Dhondi Motugade

5. Smt. Gaurabai Anna Motugade

6. Dattu Mahadu Motugade

All agriculturist of Miraj,
Revision Survey No.297,
Mhaisal Mala, Near Devi Bhavan,

.. Appellants
(Original Defendants)

versus

1. Shri Shivappa Babu Dhulubule

2. Shri Shankar Babu Dhulubule

3. Shri Vithoba Babu Dhulubule

4. Smt. Shevantabai Nayaku Dhulubule

All res. at Miraj, Dist: Sangli.

.. Respondents.
(Original Plaintiffs)

Shri N.O.Hombalkar, Advocate for the Appellants.

Shri B.P.Apte, Advocate for the Respondents.

CORAM : S.R.SATHE, J.

DATED : 3rd Dec., 2004.

JUDGMENT :

1. Being aggrieved by the judgment and order passed by the Court of Second Additional District Judge, Sangli, in Regular Civil Appeal No.26 of 1984 whereby the judgment and order passed by the Court of Civil Judge JD, Miraj in Regular Civil Suit No.293 of 1980 dismissing plaintiff's suit was set aside and appeal was allowed and defendants were directed to hand over the possession of the encroached portion to plaintiff, the original defendants have preferred this second appeal. For the sake of convenience hereafter the parties shall be referred to as plaintiffs and defendants.

2. Brief facts giving rise to this appeal are as under :

. Land bearing Survey No.298 Hissa No.2B admeasuring 1 Hectare 77 Ares, situated at Miraj is owned by the plaintiffs. According to plaintiffs there is one Tamarind tree and one wood apple (Kawat) tree situated in the western portion of the said land. To the west of the plaintiffs land there is land bearing survey no 297, Hissa No.8 which is owned by the defendants. The defendants made encroachment in plaintiffs land on western side by removing the boundary stone and pushing it towards east. When plaintiff brought this fact to the notice of the defendants, the defendants admitted that they would have their wahiwat as per the measurement. Accordingly measurement was carried out on 25.6.1974. In that measurement Cadestral Surveyor pointed out that defendants have made an encroachment to the extent of 7 gunthas in the western portion of plaintiff’s land. The defendants admitted to remove the said encroachment. However, they actually did not do so. On the contrary, the defendants further

started obstructing plaintiffs. Hence, on 28.8.1980 plaintiff's issued notice to defendants and called upon them to remove the encroachment. The defendants gave reply dated 11.9.1980 and informed the plaintiffs that the measurement carried out by the Cadastral Surveyor is not admitted by them and the alleged encroached portion in fact forms part and parcel of their land. They also contended that the two trees namely tamarind and wood apple are situated in their land and not in plaintiff's land. Hence on 10.10.1980 plaintiff's filed Regular Civil Suit No.293 of 1980 and claimed possession of the encroached land as well as the damages from the defendants.

3. The defendants filed their written statement at exhibit 11 and denied all allegations in the plaint. They contended that the tamarind tree and wood apple tree are not situated in the plaintiff's land, but the same are situated in their land. They also contended that there is one cart road between their land and plaintiff's land and they have not made any encroachment as alleged

by the plaintiff. The defendants further contended that they had never received any notice in respect of the alleged measurement. Besides this no cognizance was taken of the ancient road at the time of said measurement and the said measurement is wrong. The defendants alternatively contended that even if it is assumed that there is an encroachment, the alleged encroached portion is in possession of the defendants and their predecessors for more than 100 years and as such they have become the owners of the said land by virtue of adverse possession. The defendants contended that the suit is barred by law of limitation and plaintiff's are not entitled to get any relief. Hence on all these grounds defendants prayed for the dismissal of the suit.

4. On these pleadings the learned trial judge framed issues at exhibit 14. In order to prove the suit claim Shivappa Babu Dhulubulu examined himself at exhibit 37 and Cadastral Surveyor Patil at exhibit 27. Plaintiff also examined one other witness by name Shankar Morade at exhibit 44 and

produced the sale deed of his land as well as map drawn by the Cadastral Surveyor. As against this the defendant's produced the photo copy of the sale deed under which they purchased land bearing survey no.297 Hiss No.8 and examined Shankar Motuwade i.e. defendant no.1. After considering their evidence the trial Judge came to the conclusion that the measurement map produced and relied by the plaintiff was not correct and the same was not drawn after following due procedure. The surveyor had not measured the land of the defendant. Besides this opportunity was not given to the defendants to show the boundary marks. Hence on all these grounds the learned trial judge held that plaintiffs have failed to prove the alleged encroachment. Naturally the trial judge dismissed the plaintiff's suit.

5. The above-mentioned order was challenged by the plaintiff's in Regular Civil Appeal No.26 of 1984. During the course of hearing of the said appeal the plaintiff's filed an application for Nimtane Mojani - Superior Test. The other side was called upon to give its say and the Appellate

Court on 2.5.1985 allowed the plaintiff's application and appointed the District Inspector of Land Records as the Commissioner to have Nimtana Mojani- Superior Test of plaintiff's and defendant's land and directed the DILR to find out whether there is any encroachment in plaintiff's land as alleged. It appears that after giving due notice to both the sides and in presence of both the parties the DILR measured both the lands and submitted his report and map. Plaintiff's admitted the said map. The defendants did not admit the said map and submitted an application and prayed that the surveyor be directed to produce 'A Sheet' and other necessary papers. Accordingly the surveyor S.B.Bhosale, who had carried out the measurement produced the 'A Sheet'. After considering this new map and all other evidence on record, the First Appellate Court came to the conclusion that plaintiff's have made an encroachment in the defendants land as alleged and shown in the Commissioner's map. The First Appellate Court therefore allowed the appeal and directed the defendants to hand over the possession of the encroached portion and to pay

the damages of Rs.200/-.

5. The defendants have challenged the above mentioned order of the First Appellate Court in this Second Appeal. From the perusal of the record it appears that while admitting the said appeal, on 5.4.1991 this Court has passed the following order "Ground No.10 raises substantial question of law. Admit." The said ground No.10 reads as follows "That the learned appellate judge has committed an error in not properly reading sale deeds exhs.38 & 44".

6. At the outset it must be mentioned that at the time of hearing of this appeal Shri Hombalkar, learned advocate for the original defendants has not at all urged the above mentioned question. On the contrary, he urged only one point. He submitted that the first appellate court has wrongly relied on the Commissioner’s map. According to him the defendants had in fact submitted an application for examining the Commissioner (DILR) or surveyor who had actually drawn the map. However, the said surveyor was not

examined, so according to him in the absence of his oral evidence the first appellate court was wrong in accepting the map produced by the said surveyor. He, therefore, submitted that the map produced by the surveyor is not legally proved and can not be relied upon. As against this, the learned advocate for the original plaintiff's supported the judgment and order passed by the first appellate court.

7. It is not in dispute that the land bearing survey no.298/2B admeasuring 1 Hectare 27 ares is owned by the plaintiff and the land bearing Survey No.297 Hissa No.2 is owned by the defendant. It is also admitted that the defendants land is situated to the west of plaintiff's land. It is needless to say that in order to prove the encroachment of alleged 7 gunthas it was absolutely essential for the plaintiffs to get the land measured. According to plaintiff's, long back in the year 1974 such measurement was carried out and in that the Cadastral Surveyor had shown that the defendants have made an encroachment to the extent of 7 gunthas. The said survey map was

infact produced by the plaintiffs at exhibit 28. However, the trial court did not accept the same. Firstly, because at that time the surveyor had not measured both the lands i.e. land of the plaintiff as well as land of the defendant. Besides this, the trial court had come to the conclusion that there was no sufficient opportunity to the defendants to point out the boundary marks. So on these two grounds the learned trial judge rightly decided not to accept the said map.

7. It is pertinent to note that in the appellate court an application was submitted by the plaintiffs for Nimtana Mojani of the said land and after hearing both the learned advocates the first appellate court was pleased to appoint DILR as Commissioner for Nimtana work. It is an admitted fact that after getting necessary clarification the DILR has carried out the said work. The measurement of the land has been done by the Cadastral Surveyor Mr. Bhosale after giving due notice to both the parties. Not only that, but admittedly, both the parties were

present at the time of measurement. It appears from the record that the said measurement carried out by Surveyor Bhosale during the pendency of first appeal and in accordance with the order passed by the first appellate Court was not admitted and accepted by the defendants because according to them the Commissioner had not shown the ancient road in the said map. However, it must be noted that merely because the said ancient road was not shown the entire measurement can not be discarded. As the Commissioner might not have found the said road in existence at the relevant time, he did not mention the same. What was necessary to be done at the time of second measurement was to measure both the lands and then ascertain on the basis of old record whether any party has made encroachment on the land of the other party. If we peruse the report and the map produced by the surveyor at exhibit 22, it is very clear that the Commissioner had carried out the work and drawn the map as per the plain table basis and in the said measurement he found that the defendants had made and encroachment as alleged and shown by red colour in the said map.

8. It was argued on behalf of the defendants that though they had requested to examine the Commissioner their prayer was not accepted by the First Appellate Court and ultimately the surveyor was not examined. It was therefore argued that the map is not duly proved and no evidential value can be given to the map drawn by the surveyor when the said surveyor is not examined. While considering this aspect, firstly, it must be noted that from the perusal of the record it appears that at no point of time the defendants had submitted any application requesting the court to examine the cadastral surveyor as a witness or to give the defendants an opportunity to examine the cadastral surveyor. On the contrary, if we peruse exhibit 28, application submitted by the defendants in the first appellate court it is very clear that by that application they had only requested that cadastral surveyor S.R.Bhosale be directed to produce ‘A Sheet’ and other necessary documents in the said case. In other words that was not an application for issuing witness summons for examining a witness, but that was an

application for issuing summons to the cadastral surveyor Mr. S.R.Bhosale for production of the documents.

9. In order to substantiate his argument that in the absence of evidence of surveyor map can not be relied, the learned advocate for the defendant has drawn my attention to a case Prakash Bhadoriya vs. Dada Chahande 2002(4) Mh.L.J. 558 wherein the Single Judge of this Court has held that where the map is produced for purpose of suit it must be duly proved and it is not admissible in evidence in absence of proof of its accuracy. In that suit alongwith the plaint, plaintiff had produced a map to prove the alleged encroachment. However, the said map was not at all bearing signature of the author of the said map nor anyone was examined to prove the said map. So, under such circumstances, it was held that the said map can not be accepted in evidence in absence of proof of its accuracy. However, in the instant case the map in question is drawn by the Cadastral surveyor who was appointed as Commissioner in pursuance of the

order passed by the Court in that very suit and then the said map was produced by the Commissioner under his signature which was not disputed at any point of time. As per the order comissioner carried out the work was not disputed. So, under such circumstances the abovesaid ruling is not applicable to the facts of the present case.

10. From the perusal of exhibit 30 of the first appellate Court it is very clear that as per the order of the court Mr. Bhosale produced ‘A Sheet’ and the first appellate court passed the following order. "Both the parties have orally submitted that it is not necessary to retain the ‘A Sheet’ as it is verified and everything has become clear. Hence A sheet be returned to Commissioner". Besides this if we peruse exhibit 22 of the first appellate court therein the learned judge has passed the following order."

"Heard both sides. At the time of hearing application to call for record of Court Commissioner Viz. a Sheet was allowed. Court Commissioner Shri S.B.Bhosale has produced A Sheet.

He has explained that entire S. Nos. 298 and 297 are measured and areas of S.No.298/2b and Sr.No.298/8 are shown. This explanation is verified from A Sheet by Counsel for both parties, pencil lines are also shown in B Sheet which is on record. Hence the objection taken by respondent about measurement does not survive. A sheet is returned to witness Shri Bhosale with concurrence of both parties"

sd/-

18.12.90

9. Thus, it is very clear that the second measurement was carried out by the cadastral surveyor Bhosale as per the due procedure and in presence of both the parties. Thus there is no reason to disbelieve the same. Merely because the surveyor was not examined the map drawn by him can not be rejected, particularly when we find that there was no specific prayer by the defendants to examine the said witness. The first appellate court has therefore rightly considered the second

measurement carried out by the cadastral surveyor and relying on the same he has correctly held that plaintiffs have proved the alleged encroachment, as in the said map the Commissioner had clearly indicated that the defendants have made an encroachment from western side to the extent of 7 gunthas and the exact encroached portion was also shown in the map by red colour. It is very clear that the sale deeds produced by both the parties of their respective lands were quite old and there was nothing on record to check the boundaries of the respective lands as mentioned in the sale deeds. Ultimately, on the basis of the said sale deed as well as the old record with the DILR coupled with the final measurement map produced by the cadastral surveyor Bhosale, it is very clear that plaintiffs have proved that the defendants have made the alleged encroachment. The finding recorded by the first appellate court in that behalf is legal and correct. There is no necessity to interfere with the same.

10. In this view of the matter, there is no substance in this appeal. Appeal is dismissed

with costs.

(S.R.Sathe,J)